

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION **RECEIVED**

In the Matter of:

APR 02 2004

SOUTHEAST TELEPHONE COMPANY)
Complainant)

PUBLIC SERVICE
COMMISSION

v.)

Case No. 2004-00093

KENTUCKY ALLTEL, INC.)
Respondent)

**MOTION TO DISMISS AND
ANSWER TO MOTION TO COMPEL**

COMES NOW, Kentucky ALLTEL, Inc. ("Kentucky ALLTEL") and, in support of its Motion to Dismiss and Answer to Motion to Compel, said motion to compel having been filed by Southeast Telephone, Inc. ("Southeast") with the Kentucky Public Service Commission ("Commission") on March 19, 2004, states the following:

I. MOTION TO DISMISS

1. On March 19, 2004, Southeast filed a motion to compel, asserting among other things that Kentucky ALLTEL was in violation of various orders issued by the Commission in Docket No. 2003-00115. On March 23, 2004, the Commission issued its Order in this proceeding, treating the motion to compel filed in Case No. 2003-00115 as a Formal Complaint (hereinafter, "Complaint") and requiring Kentucky ALLTEL to satisfy the matters complained of or to answer the Complaint within ten days from the date of service of the Order.

2. Pursuant to 807 K.A.R. 5:001 Section 12(4)(a), Kentucky ALLTEL moves the Commission to dismiss the Complaint in its entirety and with prejudice as it fails to establish a prima facie case.

3. Southeast's entire Complaint rests on the arguments that Kentucky ALLTEL is not in compliance with the Commission's December 19, 2003 "Arbitration Order," February 6, 2004 "February Order," and March 5, 2004 "Interconnection Agreement Approval Order" (in Docket No. 2003-00115) and that said Orders should be enforced.
4. Southeast's claims with respect to the Orders must be dismissed on two grounds.
5. First, the Complaint must be dismissed as Kentucky ALLTEL appealed all of the Orders and the resulting interconnection agreement to the United States District Court for the Eastern District of Kentucky Frankfort Division (Case No. 03-04-16) on March 30, 2004. Kentucky ALLTEL further filed with the District Court Motions for a Preliminary Injunction and Temporary Restraining Order to enjoin enforcement of the Orders and interconnection agreement. The District Court has scheduled a hearing with respect to the Temporary Restraining Order for April 5, 2004. As jurisdiction of the Orders and all matters with respect to Docket No. 2003-00115 now rests with the federal District Court, this Commission is respectfully without jurisdiction to consider the relief requested in Southeast's Complaint.
6. During Southeast counsel's contacts with Kentucky ALLTEL, as discussed on page two of the Complaint, Kentucky ALLTEL informed Southeast of the imminence of the appeal. Despite the advance notice of the appeal, Southeast filed its Complaint nevertheless, resulting in an inefficient and duplicative use of the Commission's and the parties' resources.
7. Second, the Complaint must be dismissed as the interconnection agreement pursuant to which the relief is requested is not valid as to the services sought by Southeast, specifically UNE-P service. The interconnection agreement specifically

contemplates changes in law with respect to, for example, provision of UNE-P service and provides as follows:

4.1 This Agreement is entered into as a result of private negotiations between the Parties, and arbitration pursuant to the Telecommunications Act of 1996 (the “Act”), and/or other applicable state laws or Commission rulings. If the actions of state or federal legislative bodies, courts, or regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of any provisions of this Agreement, the affected provision will be invalidated, modified, or stayed as required by action of the legislative body, court, or regulatory agency....

37. Reservation of Rights

37.1 [N]either Party waives, and each Party hereby expressly reserves, its rights: (a) to appeal or otherwise seek the reversal of and changes in any arbitration decision associated with this Agreement; (b) to challenge the lawfulness of this Agreement and any provision of this Agreement; (c) to seek changes in this Agreement (including, but not limited to, changes in rates, charges and the Services that must be offered) through changes in Applicable Law; and, (d) to challenge the lawfulness and propriety of, and to seek to change, any Applicable Law, including, but not limited to any rule, regulation, order or decision of the Commission, the FCC, or a court of applicable jurisdiction....

89.1 ALLTEL will only unbundle and provide local circuit switching for SOUTHEAST to the extent lawfully ordered by the Kentucky Public Service Commission with respect to providing voice-grade (DS-0) equivalents to Mass Market Customers, as defined by the FCC, and shall not provide unbundled local switching with respect to any Enterprise market customers, as defined by the FCC.

8. As anticipated by these change in law provisions of the interconnection agreement, on March 2, 2004, the United States Court of Appeals of the D.C. Circuit (“D.C. Circuit”) issued an order (*United States Telecom Assoc. v. Federal Communications Commission and Bell Atlantic Telephone Co., et. al.*; Case No. 00-1012) vacating significant portions of the FCC’s latest rules. Thus, given the change in law provisions and the D.C. Circuit's decision in fact changing the law with respect to

provision of UNE-P service at other than market-based pricing, there is no basis for Southeast's claim that it is entitled to place orders for UNE-P service pursuant to such interconnection agreement.

9. Based on the foregoing, Kentucky ALLTEL requests that the Commission dismiss the Complaint in its entirety and with prejudice as the Commission is without jurisdiction to consider the requested relief and as there has been a change in law with respect to pertinent provisions of the interconnection agreement pursuant to which said relief is requested.

10. Kentucky ALLTEL reserves the right to plead further in this matter as it deems necessary.

II. ANSWER

11. Kentucky ALLTEL incorporates Paragraphs 1 through 10 above as if more fully set out herein.

12. Kentucky ALLTEL denies each and every material allegation contained in the Complaint except as herein admitted.

13. Kentucky ALLTEL denies that the Commission's Orders were "well-reasoned" or took into consideration "all recent developments at the F.C.C. and in Federal Court." (Complaint at 1.)

14. Kentucky ALLTEL denies that the Commission's Orders were lawful and likewise that Southeast's proposed orders for service pursuant to said Orders are lawful or otherwise appropriate. (Complaint at 2.)

15. Kentucky ALLTEL states affirmatively that KRS §§278.390 and 278.170 and 47 U.S.C. §252(b)(5) speak for themselves, and Kentucky ALLTEL denies that the authorities are applicable to the facts of this proceeding.

16. Kentucky ALLTEL denies that Kentucky ALLTEL "indicated in no uncertain terms that it intends to continue to violate these statutory provisions because it simply does not agree with the Commission's stance in this case." Kentucky ALLTEL states affirmatively that at no time has it conveyed to Southeast an intent to violate any statutory provision.

17. Kentucky ALLTEL denies that the relief requested by Southeast is appropriate or lawful for the reasons more specifically set forth in the foregoing Motion to Dismiss.

18. Kentucky ALLTEL reserves the right to plead further in this matter as it deems necessary.

WHEREFORE, having responded to the Complaint, Kentucky ALLTEL prays that the Commission grant its Motion to Dismiss; dismiss the Complaint in its entirety and with prejudice; and grant all other necessary and proper relief to which Kentucky ALLTEL may be entitled.

Dated this 2nd day of April, 2004.

Respectfully submitted,

KENTUCKY ALLTEL, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following via regular U.S. mail postage prepaid this 2nd day of April, 2004:

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